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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 679.

CECIL B. DEMILLE,

Petitioner,

vs.

AMERICAN FEDERATION OF RADIO ARTISTS, LOS ANGELES LOCAL, *etc., et al.,*

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The facts stated in the Petition for Writ of Certiorari are neither accurate nor complete. A flagrant error is the statement (pp. 3-4, 7, 9) that at the time respondent adopted the resolution to join the campaign against Proposition No. 12, it also adopted a resolution to the effect that participation in any radio program which would publicize the amendment on behalf of its proponents would constitute conduct unbecoming a member, and that respondent threatened expulsion if any such action was taken by a member. This statement is wholly incorrect; no such action was ever taken or threatened against petitioner. In support of the statement petitioner refers to a resolution of the membership of the Los Angeles Local of the American Federation of Radio Artists (hereinafter

referred to as AFRA) adopted at the membership meeting held July 17, 1944 [R. 70.] This resolution endorsed the campaign against Proposition No. 12 and then declared that it was the "consensus of opinion" among the members present, in favor of AFRA ruling that acceptance of employment on programs publicizing the amendment would be conduct unbecoming a member, and that this matter be "referred to Board of Directors to act on advice of counsel" [R. 70]. No such action was ever taken by the Board of Directors of AFRA; no claim is made in petitioner's complaint [R. 1-8] or anywhere else in the record or in the briefs below that any such action was taken or threatened against petitioner; it was never made an issue in the case. As pointed out by the California Supreme Court (31 Adv. Cal. Rep. at p. 145) the facts are precisely to the contrary. The only issue raised by the complaint is the legality of AFRA's action under its constitution and by-laws in suspending petitioner for nonpayment of a $1 assessment voted by the Board of Directors and membership to provide funds for a campaign of public education to defeat Proposition No. 12, which would have abolished the union shop in California.

Petitioner's attempt to inject into the case the suggestion that defendant threatened to take measures against AFRA members who desired to speak in favor of Proposition No. 12 is wholly unwarranted.

On page 2 of the Petition under the heading "Questions Presented," petitioner states that his membership privileges in AFRA were "forfeited," although at a later point (Pet. p. 7), it is recognized that a suspension only is in-

volved. Respondents desire to point out that the only action taken against petitioner was that of suspension [R. 58A, 73]; he is accordingly entitled to reinstatement upon paying the assessment.

The statement of facts in the Petition omits a number of facts which respondents deem material to a full understanding of the case. Respondents direct the Court's attention to the following facts which appear in the record.

AFRA is a labor union affiliated with the American Federation of Labor and is a component part of the Associated Actors and Artistes of America whose jurisdiction extends over all performers in the entertainment field. AFRA has jurisdiction over all performers in the radio broadcasting industry and numbers among its members all persons who act, sing, announce and perform before the microphone [R. 84-85]. It is a national organization with various locals established in different parts of the country, including Los Angeles [R. 85]. Membership in AFRA is open to all persons desiring to work as performers in the radio broadcasting industry [R. 13-14, 36]. In 1944 there were in effect and had been for some time prior thereto, numerous collective bargaining contracts between AFRA and all national radio broadcasting networks, together with a large number of individually owned radio stations and electrical transcription companies throughout the United States, all of which contracts provided for union or AFRA shop for all performers covered thereby [R. 69, 85]. The principle of AFRA shop has always been deemed by AFRA to be vital to the economic interests of its members and to the

maintenance of harmonious labor relations with the companies who employ its members [R. 69, 85]. The organic law of AFRA is set forth in the Articles of Agreement and Constitution of the Federation and the Articles of Agreement, Constitution and By-Laws of the Los Angeles Local [R. 13-56, 74-76]. From these documents it appears that AFRA's purposes are to advance, foster and promote the interests of all performers in the radio broadcasting industry, to prevent and abolish abuses and assist in securing just and equitable contracts, working conditions and compensation, to secure *proper legislation* on matters affecting its members and to coordinate the activities of AFRA with other unions when the same may be for the common good of all [R. 75-76].

On July 17, 1944, a regular meeting of the membership of the Los Angeles Local of AFRA was held in Los Angeles. Notice of such meeting was given to all members of the Local, including petitioner. The notice of meeting pointed out the dangers to organized labor and particularly to AFRA members, implicit in the initiative measure then pending before the people of California, known as Proposition No. 12, the purpose of which was to make the union shop unlawful in California, and called on every union member to attend the meeting to discuss plans for combating the measure [R. 104A]. Petitioner did not, however, attend the meeting [R. 70]. At this meeting a resolution was unanimously passed by the membership authorizing the Board of Directors "to take any action deemed proper and necessary to defeat Proposition No. 12" [R. 70].

Thereafter, the Central Labor Council of Los Angeles requested AFRA to contribute $1 per member to provide funds for a campaign of public education which was being undertaken by the California State Federation of Labor to bring about the defeat of Proposition No. 12 [R. 70]. The Board of Directors of the Los Angeles Local decided to raise such money by membership assessment, and on July 21, 1944, passed a resolution levying an assessment of $1 per member for this purpose [R. 71]. Notice of this assessment was thereafter sent to the membership [R. 71]. The notice pointed out the huge sums which were being spent by the proponents of the measure to secure its passage [R. 104A].

On August 27, 1944, the national organization of AFRA at its convention held at Cleveland, Ohio, adopted a resolution condemning all propositions pending in the various states, such as Proposition No. 12, designed to take away from unions the right to union shop, and undertaking to use all duly constituted means to defeat such anti-labor legislation [R. 85-86]. On September 22, 1944, the Board of Directors of the Los Angeles Local of AFRA adopted a resolution providing that all moneys received from the assessment be forwarded to the State Federation of Labor with written instructions that such funds be used in connection with the efforts of the State Federation of Labor to defeat Proposition No. 12 only, and under no circumstances to be used for political purposes [R. 71]. All moneys forwarded to the California State Federation of Labor were employed by it solely and exclusively

in connection with the campaign against Proposition No. 12 [R. 80]. On October 23, 1944, the action of the Local Board in adopting the assessment was ratified at a meeting of the membership of the Local. Petitioner was given notice of this meeting but again failed to attend [R. 71-72]. Thereafter, the National Board of AFRA approved the assessment [R. 72]. Thereafter, after several notices given petitioner to pay the assessment, which he refused to comply with, he was ordered suspended [R. 72-73].[1] The entire procedure followed in levying the assessment and ordering the suspension of petitioner for nonpayment thereof was reviewed and approved by the National Board of AFRA [R. 84-89].

Petitioner brought this action against AFRA and its Board of Directors to enjoin them from carrying out the order of suspension. The decision of the trial court sustaining respondents' demurrer to the complaint and denying the request for a preliminary injunction was affirmed by the District Court of Appeal (77 Adv. Cal. App. Rep. 480, 175 P. (2d) 851) and the State Supreme Court (31 Adv. Cal. Rep. 137, 187 P. (2d) 769), the decisions of both courts being unanimous.

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[1]Suspension of membership for failure to pay dues or assessments to AFRA may be ordered by the Board of Directors under Article VI, Section 3, of the By-Laws of the Local [R. 32]. This is in accordance with the settled law that a member of a union who fails to pay dues or assessments owing the association works his own suspension by his own voluntary action, and no trial or hearing is necessary in such cases. (*DeMille v. AFRA*, 31 Adv. Cal. Rep. 137, 152; *Tinker v. Modern Brotherhood of America*, 13 F. (2d) 130; *Brown v. Lehman*, 141 Pa. Super. 467, 15 Atl. (2d) 513.)

Reasons for Denying the Petition for Writ of Certiorari.

Respondents contend that the Petition for Writ of Certiorari should be denied for the following reasons:

I. On the record, petitioner has failed properly to raise any question of violation of rights under the First or Fourteenth Amendment to the Constitution of the United States.

II. The levying of an assessment of $1 per member by the AFRA Board of Directors and membership, acting pursuant to its constitution and by-laws, the proceeds of which were to be used by AFRA to inform the public of the union's opposition to Proposition No. 12, an anti-labor measure, did not violate any rights of liberty or property guaranteed petitioner under the First or Fourteenth Amendment to the Constitution of the United States.

III. The action of AFRA in ordering petitioner suspended for refusing to pay the $1 assessment was "individual action" not "state action" and involves no deprivation of rights guaranteed petitioner by the Constitution of the United States.

IV. The decision of the State Court sustaining respondents' demurrer to petitioner's complaint for an injunction restraining AFRA from suspending petitioner, was not state action in violation of any of petitioner's rights under the First or Fourteenth Amendment to the Constitution of the United States.

V. The assessment was not in violation of Section 251 of the Federal Corrupt Practices Act.

VI. The alleged federal questions raised in the petition are so unsubstantial as to foreclose the Court from taking jurisdiction.

ARGUMENT.

I.

On the Record Petitioner Has Failed Properly to Raise Any Question of Violation of Rights Under the First or Fourteenth Amendment to the Constitution of the United States.

There is nothing in the record or in the opinion of the California Supreme Court indicating that a claim of violation of petitioner's rights guaranteed under the First or Fourteenth Amendment to the Constitution of the United States was presented to the Court or ruled upon. In order to confer jurisdiction on this Court to review the decision of a State Appellate Court under Section 237(b) of the Judicial Code, as amended, it is essential that the Federal question be promptly and properly raised in the State Court. The proper place to make the claim that one's constitutional rights have been violated is in the trial court, where that is required by state practice, as is the case in California. *Mutual Life Insurance Co. v. McGrew,* 188 U. S. 291, 308-9. Assuming without conceding that the constitutional question can properly be raised for the first time in a petition for hearing filed with the Supreme Court of the State, it must be made unmistakable and not left to mere inference, and the particular clause in the Constitution relied upon must be specified. *Levy v. Superior Court,* 167 U. S. 175, 177-8; *Oxley Stave Co. v. Butler Co.,* 166 U. S. 648; *Capital City Dairy Co. v. Olin,* 183 U. S. 238, 248; *Michigan Sugar Co. v. Michigan,* 185 U. S. 112. Raising the question in briefs is not sufficient. *Mutual Life Insurance Co. v.*

McGrew, supra; Zadig v. Baldwin, 166 U. S. 485. Moreover, it must clearly appear that some portion of the Federal Constitution and not the State Constitution was relied on and such provision must be set forth. *New York Central Railroad Co. v. New York,* 186 U. S. 269, 273; *Kipley v. Illinois,* 170 U. S. 182, 186-9. Where the record is otherwise deficient and jurisdiction must be sustained by reference to the opinion of the State Court alone, this Court will confine its review to the exact Federal question considered by the State Court, and the rule of particularity and definiteness applies. Thus, where the State Constitution contains a due process clause, as does the Constitution of the State of California (Art. I, Sec. 13) the claim that due process has been violated, without specific reference to the Fourteenth Amendment to the Federal Constitution, will be deemed to refer to the State Constitution. *Bowe v. Scott,* 233 U. S. 658, 660-65; *Gibbes v. Zimmerman,* 290 U. S. 326, 328. The same is true where the allegation is merely that petitioner's "constitutional rights" have been violated. *Layton v. Missouri,* 187 U. S. 356, 359-61; *Chicago Indianapolis etc. Railroad Co. v. McGuire,* 196 U. S. 128, 131-2.

Measured by the foregoing principles, the petition herein, in so far as it is grounded on alleged violation of petitioner's constitutional rights, must fail. The complaint is silent as to any claimed violation of rights under the Constitution of the United States [R. 1-8]. The petition states that the Federal question was presented to the Court below and refers to portions of the record containing the petition for hearing by the State Supreme Court and the

opinion of that Court. However, the petition for hearing by the State Supreme Court refers to no specific provisions of the Federal Constitution nor of the State Constitution, but merely enumerates various "constitutional rights" of petitioner which it is claimed were violated [R. 133]. The opinion of the California Supreme Court discusses petitioner's contention that his constitutional rights were violated, but makes no reference to any provision of the Federal Constitution, except the Fifth Amendment, which is an inhibition on the Federal Government, admittedly not here involved. *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 248. Such general references to claimed violation of due process of law, if any significance is to be attached thereto, will be deemed to have reference to rights guaranteed under the State Constitution. *Bowe v. Scott, supra; Gibbes v. Zimmerman, supra.* The mere fact that decisions of the United States Supreme Court are cited in the opinion of the State Court does not establish that the Court considered a Federal question to have been properly raised and was deciding it. *Levy v. U. S.,* 167 U. S. 175, 177; *Osborne v. Clark,* 204 U. S. 565, 567-8.

Petitioner has failed properly to raise any claim of violation of constitutional rights secured by the Federal Constitution.

II.

The Levying of an Assessment of $1 per Member by the AFRA Board of Directors and Membership Acting Pursuant to Its Constitution and By-Laws, the Proceeds of Which Were to Be Used by AFRA to Inform the Public of the Union's Opposition to Proposition No. 12, an Anti-Labor Measure, Did Not Violate Any Rights of Liberty or Property Guaranteed Petitioner Under the First or Fourteenth Amendment to the Constitution of the United States.

Postponing momentarily consideration of the question whether the Fourteenth Amendment to the Constitution of the United States has any application whatever to the internal relationship existing between a labor union and its members and the further question whether the action by the trial court or the State Supreme Court in sustaining defendants' demurrer to petitioner's complaint, constituted state action, it is submitted that the levy of a $1 assessment on the membership of AFRA made by democratic action of the membership and Board of Directors and in accordance with the union's by-laws, to provide funds for a campaign of public education in opposition to Proposition No. 12, did not violate any of petitioner's constitutional rights. Petitioner's argument under Point 1 of the Petition is that AFRA, by levying the assessment, required petitioner to speak against Proposition No. 12 contrary to his beliefs, thereby depriving him of his freedom of speech. This contention is fallacious. Petitioner concedes the validity of the union shop

which is firmly imbedded in the jurisprudence of the State of California.[2] AFRA has, from the outset of its organization, been based on the union shop principle, and all of its collective bargaining contracts were threatened with destruction by the proposed Proposition No. 12 [R. 69, 85]. Under these circumstances, the right of AFRA to devote funds to protect itself from such destructive legislation cannot be seriously questioned.[3] There is no difference between union funds raised by assessment and funds raised by dues. If it is proper for a union to expend the former to inform the public of its stand on anti-labor legislation, it must be equally proper to expend the latter.[4] By the same token, if it is improper for a union to expend funds raised by assessment for such purpose, it is equally improper for it to expend funds contributed by dues; otherwise it would only be necessary for a union to expend its general funds and then levy an assessment to make up the deficiency. Hence, the basic question involved on this point is the right of AFRA to expend

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[2]*Parkinson Co. v. Building Trades Council*, 154 Cal. 581; *McKay v. Retail Auto Salesmen's Local Union*, 16 Cal. (2d) 311, 322; *Shafer v. Registered Pharmacists Union*, 16 Cal. (2d) 379, 387; *Park & Tilford Corp. v. International Brotherhood of Teamsters*, 27 Cal. (2d) 599.

[3]The Articles of Agreement and Constitution of AFRA expressly declare that among its purposes is to secure for its members "proper legislation upon matters affecting their professions" [R. 75]. The right of a union to expend its funds for any purpose calculated to promote the objects of the association cannot be doubted. See cases cited in opinion below, 31 Advance California Reports at pages 143-4.

[4]Assessments, second in importance to membership dues and per capita tax, form an important source of union fund raising. Robert R. Brooks: *When Labor Organizes*, p. 248 (Yale University Press, 1937).

AFRA funds, regardless of whether derived from dues or assessments, for the purpose of opposing anti-union legislation.

The internal relationship between petitioner as a member of AFRA and the union is contractual, and the membership rights of the petitioner are governed by such contract. The right of a union to suspend or expel members for violation of the conditions of such membership is settled. Courts will not interfere in such matters, except to see that the Constitution and By-Laws of the association have been complied with. *Lawson v. Hewell,* 118 Cal. 613, 618-619; *Josich v. Austrian Benefit Society,* 119 Cal. 74; *Robinson v. Templar Lodge,* 117 Cal. 370, 373-4. Under his contract of membership in AFRA, petitioner has accepted the right of the union to carry on its basic objectives and purposes through decision of the majority, and to raise funds by dues or assessments for such purposes. Funds so paid into the union become funds of the organization, not of any one member, and petitioner has no individual interest therein. *Rhode v. United States,* 34 App. Cases, Dist. Col. 249; *Lamm v. Stoen* (Iowa), 284 N. W. 464, 467. Being funds of the organization they are subject to administration by the Board of Directors in furtherance of the purposes and objectives of the union.

The expenditure of such funds by the union is in no sense an expenditure by the individual members of their own personal funds, nor does it constitute an endorsement by each union member of the purpose for which the funds are expended. A labor union is a responsible legal unit or entity; it has a distinct personality of its own; it represents and embodies the common or group interests of its members, not their private or personal interests. *U. S. v. White,* 322 U. S. 694, 701-3. It engages in a

multitude of concerted activities, none of which can be said to be the private undertakings of the members. *U. S. v. White, supra,* at pp. 701-2. Mere membership in an organization does not necessarily mean personal endorsement of every activity in which it engages. *Schneiderman v. U. S. A.,* 320 U. S. 118, at 136. Inherent in the idea of collective activity is the principle that it shall be exercised on behalf of the organization pursuant to the will of the majority of its membership. *J. I. Case Co. v. National Labor Relations Board,* 321 U. S. 332, 337-9.

In the present case, every democratic process was followed by AFRA in levying the assessment [R. 69-74]; all provisions of the Constitution and By-Laws were followed [R. 89]. The basic concept of democracy is government by the majority. It does not follow that action involving an expenditure of funds voted by a majority is necessarily an individual expression of personal endorsement by the minority against their beliefs. If petitioner's position were correct, it would never be possible for any labor organization to implement its decisions by any action involving the expenditure of funds collected from the membership, unless every member approved such action. Since labor organizations are composite entities and not individuals, and by their very nature can make no move which does not involve some expenditure, any other view would prevent such organization from acting at all. Petitioner might just as well argue that because he disagrees with the union shop principle on which AFRA is based (Pet. p. 4) the organization may not spend funds in organizing radio performers under union shop contracts since such funds are provided in part by dues or assessments paid by petitioner and this in effect makes him personally endorse such contracts. A union organized on the union shop principle may, as a part of its union activities, publish a union newspaper or magazine financed

by dues or assessments, or both, containing articles advocating the extension of the union's principles or supporting certain labor legislation, or opposing other legislation hostile to the interests of organized labor. Petitioner's argument would deny the union the right to expend funds collected by dues or assessments to publish such views, because some individual member may disagree with the point of view expressed therein.[5]

Petitioner does not contend that he was not free to vote in any way he desired on Proposition No. 12, nor that he was in any way prevented from individually supporting the measure by his funds, speeches, the holding of meetings or any other method he might choose to follow. Petitioner could freely publish in newspapers, magazines, pamphlets or any other media, and broadcast over the radio his personal views on the issue of open shop versus union shop and could present without restraint his reasons for advocating the passage of the initiative measure. Nothing that AFRA did interfered in any manner with the full, complete and unrestricted exercise by petitioner of all of the foregoing rights. Petitioner's true position is that while enjoying the fullest possible freedom of

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[5]The activities of the American Federation of Labor in supporting legislation beneficial to labor and opposing anti-labor legislation is historical and constitutes one of its most vital functions. Substantial sums paid to unions by its membership either through dues or assessments are expended in this vital work. See pamphlet *Legislative Achievements of American Federation of Labor*, published by American Federation of Labor, Jan. 1, 1943. Harwood Lawrence Childs: *Labor and Capital in National Politics* (Ohio State University Press, 1930), pages 70-74, 189, 197, 246. Wayne L. McNaughton: *The Development of Labor Relations Law* (American Council on Public Affairs, 1941), pages 24-25.

speech himself, he has the right to deny AFRA a like freedom.

Petitioner cites *Martin v. Struthers,* 319 U. S. 141, where this Court upheld the right of every individual to distribute information as being "clearly vital to the preservation of a free society." Such right is, however, to be accorded to labor unions as well as single individuals. *A. F. of L. v. Swing,* 312 U. S. 321; *Senn v. Tile Layers Union,* 301 U. S. 468. This right of free speech and expression would be an idle gesture if a union were denied the right to use union funds, whether derived from dues or assessments, to express its views on matters of vital concern to the group interests of its members, whenever one member disagreed with the union policy.

West Virginia Board of Education v. Barnett, 319 U. S. 624, cited by petitioner, declares that an enforced flag salute is a form of utterance requiring an affirmation of belief and an attitude of mind. However, the analogy is utterly inapplicable to the contractual relationship existing between a union member and the union, in which the individual member accepts the right of the union by action of its Board of Directors and a majority of its membership, to engage in such activities as are deemed beneficial to the group interests of the membership and where such action in no sense carries with it the individual endorsement of every member.

Clearly, the union in levying the assessment to oppose Proposition No. 12 did not in any way violate any of petitioner's constitutional rights under the Fourteenth Amendment.

III.

The Action of AFRA in Ordering Petitioner Suspended for Refusing to Pay the $1 Assessment Was "Individual Action" Not "State Action" and Involves No Deprivation of Rights Guaranteed Petitioner by the Constitution of the United States.

Apart from the fact that the levy of the $1 assessment by AFRA did not violate any of petitioner's individual rights of liberty, property or freedom of speech, this Court is without jurisdiction since the Fourteenth Amendment has no application to action by private individuals but only to state action. The language of the Fourteenth Amendment, Section 1, is, in part, "nor shall any state deprive any person of life, liberty or property without due process of law." These guarantees apply only to action by the states and not to action by private individuals or groups. *Virginia v. Reeves,* 100 U. S. 313, 318; *U. S. v. Harris,* 106 U. S. 629, 638; *Civil Rights Cases,* 109 U. S. 3, 11; *Corrigan v. Buckley,* 271 U. S. 323, 330; *Grovey v. Townsend,* 295 U. S. 45; *Kiernan v. Multnomah County,* 95 Fed. 849; *Davidson v. Lachman Bros. Inv. Co.,* 76 F. (2d) 186; *Mason v. Hitchcock,* 108 F. (2d) 134 (action by Board of Bar Examiners refusing plaintiff admittance to practice law); *Swank v. Patterson,* 139 F. (2d) 145 (action against members of medical association); *Moses Taylor Lodge No. 95 v. Delaware L. & W. Ry. Co.,* 39 Fed. Supp. 456 (action by union against railroad company for denying members rights under collective bargaining contracts); *Mitchell v. Greenough,* 100 F. (2d) 184, cert.

den. 306 U. S. 659 (alleged conspiracy to deprive petitioner of right to practice law); *National Federation of Railway Workers v. National Mediation Board,* 110 F. (2d) 529, 537, cert. den. 310 U. S. 628 (action by union member against union for violating membership rights); *Teague v. Brotherhood of Locomotive, Firemen & Enginemen,* 127 F. (2d) 53 (action by union member against union for alleged violation of constitutional rights); *McIntire v. Wm. Penn Broadcasting Co.,* 151 F. (2d) 597, cert. den. 327 U. S. 779 (action against radio station for alleged violation of constitutional right of freedom of speech).

Petitioner's contention, in essence, is that respondent AFRA violated his constitutional rights of freedom of speech and property. Under the foregoing authorities, such contention involving action solely by private individuals involves no abridgement of any rights guaranteed petitioner under the Fourteenth Amendment. The First Amendment applies only to action by the Federal Government and is obviously not here involved.

IV.

The Decision of the State Court Sustaining Respondent's Demurrer to Petitioner's Complaint for an Injunction to Restrain AFRA From Suspending Petitioner Was Not State Action in Violation of Any of Petitioner's Rights Under the First or Fourteenth Amendment to the Constitution of the United States.

A state may in certain circumstances violate the Fourteenth Amendment to the Constitution of the United States by judicial decree as well as by legislation. This rule has been applied where a person has sought judicial aid in enforcing a claim or demand, the enforcement of which violates the Fourteenth Amendment, and where the State Court has rendered a judgment enforcing such right. In such cases, the coercive power of the state acting through the judicial arm has been held to violate the constitution. It is not necessary to determine whether this rule applies where a party seeks judicial aid to enforce compliance with a private contract. (*Cf. Corrigan v. Buckley, supra.*) The question is not involved in this case for the reason that AFRA, the party who it is claimed violated petitioner's rights, has neither sought nor obtained judicial aid to enforce its contract of membership with petitioner. It is petitioner who has sought the aid of the Court to prevent AFRA from privately exercising its contractual right against him for violating its Constitution and By-Laws. The trial court denied petitioner relief by sustaining respondents' demurrer. As the matter stood before the trial court, such action was plainly proper since the acts complained of were authorized under the Constitution and By-Laws of AFRA and in any event were acts of private individuals, not subject to protection under the Fourteenth Amendment. The ruling of the trial court in sustaining the demurrer was not state

action in violation of the Fourteenth Amendment, nor was the ruling of the Appellate Court, which affirmed the judgment. (*U. S. v. Harris,* 100 U. S. 629; *Mason v. Hitchcock,* 108 F. (2d) 134; *Swank v. Patterson,* 139 F. (2d) 145; *Mitchell v. Greenough,* 100 F. (2d) 184 (cert. den. 306 U. S. 659); see Point III, *supra.*) Were the rule otherwise, every individual who claims his rights have been violated by the actions of private individuals and who is therefore not entitled to relief on constitutional grounds, has only to go to Court and lose his case and then claim that the action of the Court in denying him relief is state action which violates his constitutional rights.

Petitioner requests that the rule be relaxed to the extent necessary to grant him relief, but to relax the rule as petitioner requests would be to abolish it entirely. (*U. S. v. Harris,* 100 U. S. 629 at 643.) As stated in *Kiernan v. Multnomah County,* 95 Fed. page 849, such contention would mean that "every invasion of the rights of one person by another would be cognizable in the Federal Court." This would entirely abolish the basic distinction which exists between individual action and state action.

Petitioner cites *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, in support of the contention that state action exists in the case of judicial inaction, as well as judicial action. In that case, plaintiff was denied the right to come into Court at all, not because its claim was not meritorious, but because assuming merit, it did not first seek an administrative remedy, which in fact was not available. In the present case, petitioner was denied relief because his complaint failed to state a meritorious cause of action. Since petitioner's complaint was bottomed on alleged acts of private individuals, no violation of constitutional rights could properly have been found by the trial court in any event, and its ruling was clearly correct.

V.

The Assessment Levied by AFRA to Raise Funds to Aid in the Defeat of Proposition No. 12 Was Not in Violation of Section 251 of the Federal Corrupt Practices Act.

Petitioner argues that the assessment is void because the contribution of funds by the union to defeat Proposition No. 12 would be contrary to the Federal Corrupt Practices Act. It is submitted that this Federal law has no application in this case. The Federal Corrupt Practices Act (2 U. S. C. Sec. 251, as amended June 25, 1943) prohibits corporations and labor unions from making contributions in connection with the election to office of certain designated Federal officials. There is nothing in the language of the act even remotely suggesting that it has, or was intended to have, any application to contributions in connection with state legislative matters which happen to be submitted to the voters on a ballot which also contains the names of candidates for Federal office.[6] The Federal Corrupt Practices Act was enacted pursuant to the authority of Congress contained in Article I, Section 4, of the Federal Constitution to legislate with respect to "the manner of holding elections for senators and representatives." (*Newberry v. U. S.*, 256 U. S. 232, 248.) It is contained in Title II of the United States Code entitled "The Congress" which contains the Federal laws dealing with the election, organization and functioning of the United States Congress. Congress, in enacting the Federal Corrupt Practices Act, obviously did not intend

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[6]Title II, Chapter 1, Paragraph 7, of the United States Code, fixes the Tuesday next after the first Monday in November in every even numbered year as the day for the election of representatives and delegates to Congress. Section 950 of the California Election Code fixes the same date as the date for holding the general election in the State.

that it should apply to legislative matters at all, and certainly did not intend that it should apply to legislative matters which are proposed for adoption in the several states. Congress has no power over state elections in so far as they relate exclusively to state matters. (*U. S. v. Gradwell,* 243 U. S. 476; *Ex Parte Siebold,* 100 U. S. 371, 393.) Such matters are for the individual states to regulate and are beyond the scope of the Federal power.

Some states have enacted State Corrupt Practices Acts prohibiting contributions in connection with state elections.[7] The State of California has not enacted such legislation.[8]

For convenience and economy, state legislative matters are commonly placed on the same ballot which contains the name of candidates for Federal office.[9] Under petitioner's contention, any corporation or labor union which contributes funds to inform the public of its views on any such state measure would violate the Federal Corrupt Practices Act. Thus a labor union could not lawfully con-

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[7]See for example: *State v. Terre Haute Brewing Co.,* 186 Ind. 248; 115 N. E. 772; *La Belle v. Hennepin County Bar Assn.,* 206 Minn. 290; 288 N. W. 788; *State v. Kohler,* 200 Wisc. 518; 228 N. W. 895.

[8]A bill (known as A. B. 1953) to prohibit labor unions from levying assessments to raise funds for urging or opposing legislation or any initiative or referendum matter was introduced into the California Legislature subsequent to the decision rendered by the trial court in the within case and was tabled by the California State Assembly on May 9, 1945. (*Final Calendar of Legislative Business, California Legislature (56th Session), 1945, page 654.)*

[9]Footnote 6, *supra.*

tribute any of its funds to print and distribute a pamphlet outlining reasons for voting against a particular anti-labor measure pending in a state. It could not contribute funds to purchase space in a newspaper or to hire a hall or to purchase radio time for such purpose. This is an unreasonable construction of the Federal Corrupt Practices Act which does violence to its plain purpose and objectives and will not be adopted. (*U. S. v. American Trucking Assoc.*, 510 U. S. 534, 543.) The Federal Corrupt Practices Act, being a penal statute imposing fine and imprisonment, will not be given an application beyond its clear and intended meaning. (*Newberry v. U. S.*, 256 U. S. 232; *U. S. v. Brewer*, 139 U. S. 278, 288.)

What has been said above assumes that the case involves a "contribution" by AFRA in connection with Proposition No. 12. However, the complaint does not allege such contribution. It does not allege any violation of the Federal Corrupt Practices Act. It does not even allege the purpose of the assessment, except in so far as it is set forth in Exhibit D, which states that the assessment was to be used "to finance the campaign in opposition to Proposition No. 12, or the misstated title 'Right of Employment Amendment' to be submitted on the state ballot in November" [R. 56]. No "contribution" of funds to any political party or committee or for any political purpose is alleged. The record shows that the funds were turned over to the State Federation of Labor to be expended only for the purpose of opposing Proposition No. 12 [R. 71, 80]. Even in its application to the election of Federal officials, the Federal Corrupt Practices Act, as it stood in

1944, applied only to "contributions" and not "expenditures."[10]

To construe the Federal Corrupt Practices Act as it read in 1944 as prohibiting such expenditures would render it unconstitutional. (*Bowe v. Secretary of the Commonwealth,* 320 Mass. 230; 69 N. E. (2d) 115; *U. S. A. v. Congress of Industrial Organizations.*[11] A statute will, wherever possible, be construed so as to render it constitutional as against an interpretation making it unconstitutional. (*Screws v. U. S.,* 325 U. S. 91, 98.)

Full freedom of discussion of legislative issues within a state is vital to the creation of an informed and intelligent electorate. *A fortiori* is this so in the case of Proposition No. 12 which was a proposal to amend the Constitution of the state so as to change what had been the established law in the state on the subject of union shop for many years. If and when such expenditures by either corporations or unions in the State of California are deemed unwise, it will be for the state to regulate the same by proper legislation, not by attempting to apply a Federal law dealing with a wholly different matter.

The claim of violation of the Federal Corrupt Practices Act is without merit.

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[10]The Federal Corrupt Practices Act was amended by Section 304 of the Labor Management Act of 1947 (2 U. S. C., Sec. 251) to prohibit labor organization from making "expenditures" in connection with elections for federal office, as well as contributions. This amendment was recently held unconstitutional in the *United States of America v. Congress of Industrial Organization* (Dec'd March 15, 1945, U. S. Dist. Ct., D. C.), ...Fed. Supp. ....., reported in Commerce Clearing House, 14 Labor Cases, p. 72,999.

[11]Footnote 10, *supra.*

VI.

The Alleged Federal Questions Raised in the Petition Are So Unsubstantial as to Foreclose the Court From Taking Jurisdiction.

The asserted Federal questions raised are so devoid of merit as not to constitute a basis for this Court taking jurisdiction. (*Erie Railroad Co. v. Solomon,* 237 U. S. 427; *Del Mar Jockey Club v. Missouri,* 210 U. S. 324; *Goodrich v. Ferris,* 214 U. S. 71, 79; *Berkman v. United States,* 250 U. S. 114; *Sugarman v. United States,* 249 U. S. 182.

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

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